THE

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LEGAL COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS

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EDITOR'S COMMENTS

Welcome to the third installment of Volume 4 of *The Quarterly Review* (QR). The Legal Division of the Federal Law Enforcement Training Center is dedicated to providing federal law enforcement officers with quality, useful and timely Supreme Court reviews, interesting developments in the law, and legal articles written to clarify or highlight various issues. The views expressed in these articles are the opinions of the author and do not necessarily reflect the views of the Federal Law Enforcement Training Center. The QR is researched and written by members of the Legal Division. All comments, suggestions, or questions regarding the QR can be directed to Robert Cauthen at (912) 267-2179 or rcauthen@fletc.treas.gov. Should you wish to join the QR Mailing List and have the QR delivered directly to you via electronic mail attachment, please provide your current e-mail address to Mr. Cauthen. Copies of the current and past issues of the QR can be viewed by visiting the Legal Division web page at: http://www.fletc.gov/legal/legal_home.htm. This volume of the QR may be cited as "4 QUART. REV. ed.3 (2003)".

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Special thanks to the following members of the Legal Division who voluntarily contributed to *The Quarterly Review*.

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RECENT CHANGES TO FEDERAL CRIMINAL PROCEDURE RULES OF INTEREST TO LAW ENFORCEMENT OFFICERS

Keith Hodges
Senior Legal Instructor

The Federal Rules of Criminal Procedure (hereinafter "Rules") establish and describe the federal prosecution process. While most of the Rules are of primary interest to trial lawyers and judges, many Rules directly affect how cases are investigated, search warrants and legal process are obtained, and how you process the defendant once an arrest is made.

A completely new set of Rules went into effect on December 1, 2002. This article discusses changes to the Rules that are of interest to federal officers. In addition, this article will also discuss changes reflected in the Rules and other statutes implemented by the USA PATRIOT ACT (P.L.107-56) and the Homeland Security Act of 2002 (P.L. 107-296) that affect federal criminal procedure. A complete copy of the new Rules is available at http://www.house.gov/judiciary/Crim2002.pdf.[1]

Unless otherwise indicated, "judge" refers to either a federal magistrate or district court judge.

I. The Big Picture – New Style and Adopting Past Interpretations.

a. The Rules are now better organized. Paragraphs that addressed more than one topic were separated into different paragraphs. The language is succinct and clear. While there are some changes in Rule numbers, most of the Rules that impact you have the same Rule number.

b. Every set of rules is subject to interpretation, and those interpretations become part of the law when applying those rules. The new Rules incorporate "past practices" and interpretations. Of interest to law enforcement officers is:

(1) ***Preliminary Examinations are now called Preliminary Hearings.*** Rule 5.1.

(2) ***Whatever a magistrate judge can do, a district court judge can do.*** The old and new Rules stated that certain functions were to be performed by a "magistrate judge." Though it is intuitive that district court judges can perform any function a magistrate judge could, that principle was not explicitly stated in the old Rules. For example, Rule 5 states that an initial appearance is to be conducted before a magistrate judge. Would the law permit the appearance to be conducted before a district court judge? Rule 1(c) makes clear that a district court judge can perform any function that a magistrate judge may perform. The practice should remain that officers will use magistrates for all the functions that a magistrate is allowed to perform, and use a district court judge for such functions under only extraordinary conditions.

[1] Officers can expect later modifications to Rule 6(e) as discussed in section V of this article.

II. Changes to Search and Seizure Procedure.

The Rules have always provided the basic procedural steps in obtaining search warrants. These Rules have been substantially expanded and give officers more flexibility.

a. ***Categories of evidence for which a search warrant may be issued.*** Every officer is familiar with the Rule 41 listing of the types of evidence that may be the subject of a search warrant. Even if you have probable cause that a particular item is presently in a particular location, a search warrant cannot be issued unless that evidence falls into one of the categories provided for in the Rules. Old Rule 41(b) is now Rule 41(c), and new Rule 41(c) provides:

"(c) Persons or Property Subject to Search or Seizure. A warrant may be issued for any of the following:
(1) evidence of a crime;
(2) contraband, fruits of crime, or other items illegally possessed;
(3) property designed for use, intended for use, or used in committing a crime; or
(4) a person to be arrested or a person who is unlawfully restrained."

You should note, that while the categories have not changed, the wording of the categories has. You should take care when preparing an application for a search warrant (AO Form 106 in most districts) to ensure the new language is used. Templates, "go-bys," and other references should include the new language as well as show the Rule reference has changed from 41(b) to 41(c).

b. ***Nationwide, domestic terrorism search warrants.*** Once you develop probable cause to search a particular location for a particular item, the Rules provide which judge may issue the warrant. New Rule 41(b)(1) permits a judge to issue warrants for property within that judge's district. New Rule 41(b)(2) allows a judge to issue a warrant for property "located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed." The new Rules did not change the law with respect to those provisions (though the wording is a little different.) The USA PATRIOT Act added a third category, reflected in new Rule 41(b)(3), which provides:

> " a magistrate judge--in an investigation of domestic terrorism or international terrorism (as defined in 18 U.S.C. § 2331)--having authority in any district in which activities related to the terrorism may have occurred, may issue a warrant for a person or property within or outside that district."

(1) ***Domestic terrorism defined[2] (18 U.S.C. § 2331).*** Domestic terrorism are activities

[2] International terrorism is defined as "activities that—
(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
(B) appear to be intended--
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and
(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in

that—"(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
(B) appear to be intended--
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
(C) occur primarily within the territorial jurisdiction of the United States."

(2) ***The effect of Rule 41(b)(3) search warrants.*** In the usual, non-terrorism case, when you have probable cause that evidence of a crime is located in several districts, you must obtain a search warrant from a judge in each district.[3] Such a process can delay or compromise an investigation. If the case is one of domestic or international terrorism, any judge in any district in which activities related to the terrorism may have occurred may issue the warrant. Further, that warrant may authorize searches outside the judge's district. The judge who issues the search warrant does not have to be in the district where the crime occurred, only a district where activities relating to the crime occurred. This is a powerful tool. You must be clear, however, that a Rule 41(b)(3) warrant is not a blank check to search for anything in any district; the Rule does not change the requirement to establish probable cause to search, to include both probable cause that a particular item exists and probable cause that it is where you want to search. Rule 41(b)(3) will only reduce the number of search warrant applications in cases of terrorism where there is probable cause to search for evidence in more than one district.

c. ***Covert Entry ("Sneak and Peek") Warrants.*** The usual search warrant allows an intrusion in order to search for and/or seize particular evidence. Once the warrant has been executed, you are required to prepare an inventory, deliver a copy of the search warrant to the affected person or persons, provide a receipt for the property taken, and make a return. (Rule 41(f)). But, what can you do when you have probable cause that evidence of a crime is in a suspect's home, you want to look at it – and maybe photograph it – but you do not want the suspect to know you are on the case? If you execute the traditional warrant, you are required to give the suspect a copy of the warrant and make a return. Our suspect will then know he or she is under investigation.

Though some districts have permitted a delay in the return and delivery of a copy of the warrant, the Rules do not support that procedure. Section 213 of the USA PATRIOT Act, now codified in 18 U.S.C. § 3103a, allows you to request, and judges to grant, delays in notice provisions if evidence is not going to be seized and the court finds "reasonable cause" to believe that providing immediate notification of the execution of the warrant may have an adverse result. [4] The statute

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terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

[3] Section 220 of the USA PATRIOT ACT also permits nationwide search warrants for non-terrorism crimes when searching for certain electronic communications. That topic is beyond the scope of this article.
[4] The full provisions reads: "(b) Delay. With respect to the issuance of any warrant or court order under this section, or any other rule of law, to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States, any notice required, or that may be required, to be given may be delayed if--
(1) the court finds reasonable cause to believe that providing immediate notification of the execution of the

does not say for how long the delay can or should be granted; you will have to articulate in your search warrant application why a delay is required, the adverse effect if notice is given, and how long the delay should last.

Armed with a covert entry warrant (one where the judge permits a delay in the Rule notice requirements), you can develop probable cause that a conspirator has documents in his home naming other co-conspirators, enter the house to read and copy the documents, and delay tipping off the defendant that the documents had been seen by law enforcement.

Covert entry search warrants are different than the usual search warrant in only two respects: (1) evidence will not be seized, and (2) the judge has authorized a delay in the notification requirements. A covert entry warrant still requires probable cause that evidence is in the place you want to enter. So, if in our co-conspirator example above, you only *suspected* the documents were in the house, the judge should not issue a search warrant of any kind – covert entry or not.

III. Initial Appearance Issues.

a. ***Where to take the defendant for an initial appearance?*** Old Rule 5(a) provided that, after an arrest, the defendant should be taken "without unnecessary delay before the nearest available magistrate judge" for an initial appearance. How do you determine which judge is the "nearest?" Is that tested by distance, or the time necessary to get to the judge's chambers? What does "available" mean? Some districts also silently incorporated the requirement that the nearest available magistrate judge was one in the district of arrest, and crossing district boundaries for an initial appearance could present procedural issues. New Rule 5(c) resolves these questions.

If the defendant is arrested in the district where the crime allegedly occurred, the defendant *must* be taken to a judge in the district of arrest. That would probably be your preference anyway.

When the defendant is arrested in a district other than the district where the crime allegedly occurred, you have three options in where to take the defendant for an initial appearance:

(1) The district of arrest,

(2) An adjacent district if the initial appearance can occur more promptly there, or

(3) An adjacent district if the crime was allegedly committed there and the initial appearance will occur on the day of arrest.

The requirement that the initial appearance be held "without unnecessary delay" has not changed. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) is viewed in most districts as

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warrant may have an adverse result (as defined in section 2705);

(2) the warrant prohibits the seizure of any tangible property, any wire or electronic communication (as defined in section 2510), or, except as expressly provided in chapter 121 [18 USCS §§ 2701 et seq.], any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and

(3) the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown."

providing a 48 hour standard of when an initial appearance must be held.[5]

b. ***Initial appearance upon a summons.*** The old Rules did not make explicit that a defendant can be subjected to an initial appearance if a summons was issued instead of appearing after arrest. Rule 5(a)(3) now provides for an initial appearance when the defendant has received a summons.

c. ***Returns on an arrest warrant.*** The old Rules provided that a return on an arrest warrant will be made to the judge who issued the warrant. New Rule 4(c)(4)(A) provides that the return will be made to the judge before whom the defendant is brought for an initial appearance.

IV. Subpoenas.

a. ***New Rule 17(c)(1) adds "data" to the list of items that may be subpoenaed.*** While the previous categories of "books, papers, documents, or other objects the subpoena designates" probably covered data, the addition of the "data" is important when you want not only printouts of data, but the actual data itself for analysis.

b. ***Contempt for disregarding a subpoena.*** New Rule 17(g), implementing changes to 28 USCS § 636, permits judges who issue subpoenas to hold the one who fails to respond to the subpoena in contempt. The prior Rule stated that failure to obey a subpoena could be *deemed* as contempt.

V. Grand Jury Secrecy.

a. Rule 6(e) continues to limit the conditions under which grand jury matters may be disclosed, to whom disclosure may be made, and who may authorize disclosure. The framework of when and how this is done is preserved. The USA PATRIOT Act and the Homeland Security Act of 2002 added some other situations when grand jury matters may be disclosed. The new Rules include changes made by the USA PATRIOT Act.

b. ***Foreign intelligence disclosures under the USA PATRIOT ACT.*** Rule 6(e)(3)(D) is new and permits "an attorney for the government" (which includes US Attorneys and AUSAs) to disclose grand jury matters involving foreign intelligence or counterintelligence to other federal officials. There are limitations on the recipient agency's further disclosure and the court must be informed of the disclosure. Foreign intelligence information is defined in Rule 6(e)(3)(D)(iii) as:

"(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against--

. actual or potential attack or other grave hostile acts of a foreign power or its agent;

. sabotage or international terrorism by a foreign power or its agent; or

. clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

[5] You should note that both the Rules, and the Committee Notes by the drafters of the Rules, emphasize that even in cases where you may use a state or local judicial officer for an initial appearance, that option should not be used unless a federal judge is unavailable.

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to--

. the national defense or the security of the United States; or

. the conduct of the foreign affairs of the United States."

c. ***Disclosures for use in connection with civil forfeiture provisions under the USA PATRIOT ACT.*** Rule 6(e)(3)(A)(iii) is new and based upon an amendment to 18 U.S.C. § 3322. The Rule permits an AUSA to disclose grand jury matters to another AUSA for government use in enforcing section 951 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 [12 USCS § 1833a].

d. ***The Homeland Security Act of 2002 amendments to Rule 6(e).*** The Homeland Security Act of 2002 was passed on November 25, 2002, and included changes to Rule 6(e). Unfortunately, this Act amended the language in the *old* Rules at a time when the *new* Rules were pending Congressional approval. When both the Homeland Security Act and the changes to the Rules become law, there was conflict in the language. Below are the changes made to the Rules by the Homeland Security Act that are not yet reflected in the new Rules.

(1) Allows disclosure to appropriate federal, state, local or foreign government officials for the purpose of prevention or response, of grand jury matters involving a threat of grave acts of a foreign power, domestic or international sabotage or terrorism, or clandestine intelligence gathering by an intelligence service or network of a foreign power, within the United States or elsewhere;

(2) Permits disclosure to appropriate foreign government officials of grand jury matters that may disclose a violation of the law of such government;

(3) Requires state, local, and foreign officials to use disclosed information only in conformity with guidelines jointly issued by the Attorney General and the Director of Central Intelligence, and

(4) Treats as contempt of court any knowing violation of guidelines jointly issued by the Attorney General and Director of Central Intelligence with respect to disclosure of grand jury matters.

VI. Presence of the Defendant and Video-Teleconferencing.

a. ***Presence of the defendant in court.*** The Rules have been amended to specifically allow the defendant to be absent from the initial appearance, arraignment, and, in the case of a trial of a Class A misdemeanor or less, the trial itself. The absence must be with both the defendant's and the court's consent, and then only if certain other conditions are met.

b. ***"Video Teleconferencing."*** Of far greater significance to federal officers is that the new Rules permit teleconferencing at the initial appearance and arraignment. The committee that drafted the Rules, to include several Supreme Court Justices who were part of the Rules making process, struggled with the teleconferencing provisions and elected to allow trial judges to decide whether to use teleconferencing on a case-by-case basis. You may expect judges to be very conservative in deciding whether to use video teleconferencing even if the resources to do so are available.

VII. Acceptability of Hearsay.

The old Rules contained numerous provisions that hearsay was acceptable at certain pretrial stages and in affidavits. For example, old Rule 41(c)(1) stated a search warrant affidavit could be based on hearsay, in whole or in part. The word "hearsay" does not appear at all in the new Rules, but the acceptability of hearsay in obtaining a warrant and other process has *not* changed.

The Committee that drafted the new Rules observed that the hearsay rule is part of the Federal Rules of Evidence. With the exception of privileges, the Federal Rules of Evidence apply only to trials. Grand jury proceedings, criminal complaints, non-trial proceedings, and affidavits, by definition, are not part of "the trial." The Rules Committee believed it redundant to state in the Rules what the Federal Rules of Evidence already said.

Affidavits based in whole or part on hearsay, as well as hearsay at non-trial proceedings, remains legally acceptable.

VIII. Special Provisions for the Department of Defense and Extra-Territorial Application.

The next issue of the Quarterly Review will address changes to the law for the Department of Defense and the Extra-Territorial Application of the Rules.

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QUESTIONING IN SIXTH AMENDMENT RIGHT TO COUNSEL SITUATIONS
–
A FLOWCHART ANALYSIS APPROACH

T. Dean Hawkins
Senior Legal Instructor

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right …to have the assistance of counsel for his defense."

It is important for investigators to understand when the Sixth Amendment right to counsel is engaged and the consequences thereof. The Sixth Amendment right to counsel is fundamentally different than the right to counsel under the *Miranda* decision. The crucial element of the Fifth Amendment right to counsel is custody. The Sixth Amendment right to counsel is triggered when the defendant has been formally charged, and the proceedings are at a "critical stage."

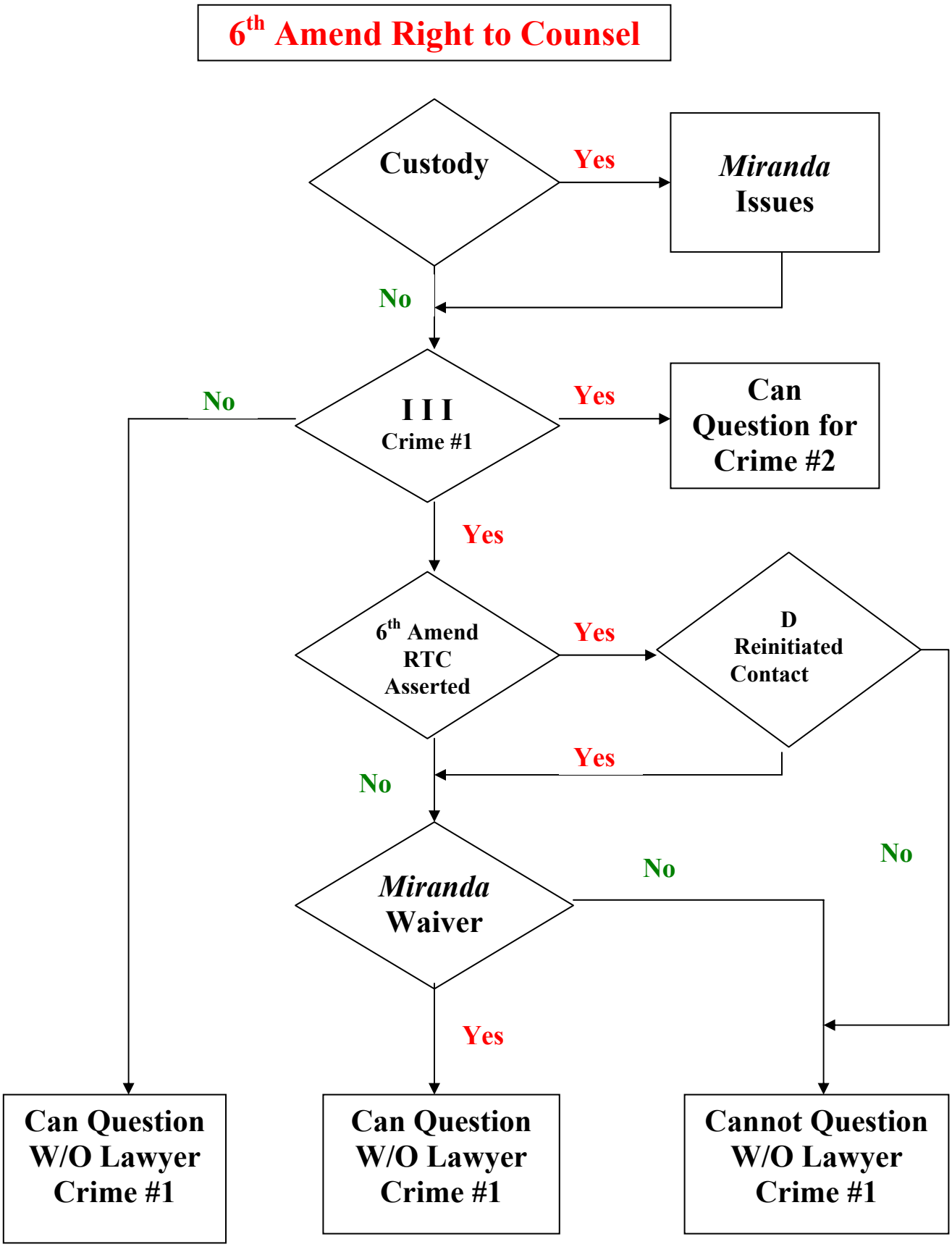
The attached flowchart is an approach to understanding when, and for which crime(s), an investigator can question a defendant without an attorney present after he has been formally charged with a crime.

Understanding the Sixth Amendment right to counsel is a two-step process. The first step is to determine if the right has attached. The second step is whether the defendant has asserted the right.

The Sixth Amendment right to counsel automatically attaches after a defendant has been formally charged with a crime. It is a right to counsel for defending against the charges. This right attaches at the inception of adversarial judicial proceedings, i.e. the first of **I**ndictment, **I**nformation or **I**nitial Appearance, (the "I I I" rule). The defendant then has the right to counsel at every subsequent critical stage of the proceedings, which includes questioning by law enforcement officers. *Brewer v. Williams*, 430 U.S. 387 (1977).

If the right has attached, the next inquiry is whether the defendant has asserted the right. If not, he can be questioned without his lawyer, after the giving and waiver of *Miranda* rights. *Patterson v. Illinois*, 487 U.S. 285 (1988). If the defendant has asserted the right, he may not be questioned unless his attorney is present. *Michigan v. Jackson*, 475 U.S. 625 (1986). However, if the defendant initiates the communications with an agent, a valid waiver of this right may be obtained.

This right is "offense specific," that is it attaches only to the crime charged. Thus, investigators can question the defendant about uncharged matters. *Texas v. Cobb*, 532 U.S. 162 (2001).


6th Amend Right to Counsel
Custody
Yes
Miranda Issues
No
No
I I I
Crime #1
Yes
Can Question for Crime #2
Yes
6th Amend RTC Asserted
Yes
D Reinitiated Contact
Yes
No
No
No
Miranda Waiver
Yes
Can Question W/O Lawyer Crime #1
Can Question W/O Lawyer Crime #1
Cannot Question W/O Lawyer Crime #1

CASE BRIEFS
UNITED STATES SUPREME COURT
and CIRCUIT COURT UPDATES

SUPREME COURT

Cook County v. United States ex rel. Chandler
___ U.S. ___, 123 S. Ct. 1239
March 10, 2003

SUMMARY: A local government is a "person" that can be liable under the False Claims Act (FCA), 31 U.S.C. 3729 et seq.

FACTS: The fraud in this case allegedly occurred in administering a $5 million grant from the National Institute of Drug Abuse to Cook County Hospital, owned and operated as the name implies, with the object of studying a treatment regimen for pregnant drug addicts. The grant was subject to a variety of conditions, including the terms of a compliance plan meant to assure that the study would jibe with federal regulations for research on human subjects. Administration of the study was later transferred to a different, nonprofit research organization affiliated with the hospital. Chandler ran the study from September 1993 until the institute fired her in January 1995. In 1997, Chandler filed a *qui tam* action, claiming that the County and the institute had submitted false statements to obtain grant funds in violation of the FCA. Chandler also alleged that she was fired for reporting the fraud to doctors at the hospital and to the granting agency, rendering her dismissal a violation of both state law and the whistle-blower provision of the FCA. The Government declined to intervene in the action. Cook County claimed that a local government, like a State government, cannot be liable under the FCA because it does not fall within the definition of a "person" subject to the FCA. The Supreme Court heard the case to address a split among the circuit courts of appeals on this issue.

ISSUE: Is a local government a "person" that can be held liable under the FCA?

HELD: Yes

DISCUSSION: The False Claims Act (FCA) provides for civil penalties against "any person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government … a false or fraudulent claim for payment or approval." Although the Attorney General may sue under the FCA, so may a private person, known as a relator, in a *qui tam* action brought "in the name of the Government," but with the hope of sharing in any recovery. The relator must inform the Department of Justice of her intentions and keep the pleadings under seal for 60 days while the Government decides whether to intervene and do its own litigating. If the claim succeeds, the defendant is liable to the Government for a civil penalty between $5,000 and $10,000 for each violation, treble damages (reducible to double damages for cooperative defendants), and costs. The relator's share of the "proceeds of the

action or settlement" may be up to 30 percent, depending on whether the Government intervened and, if so, how much the relator contributed to the prosecution of the claim. The relator may also get reasonable expenses, costs, and attorney's fees.

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Supreme Court held that States are not "persons" subject to qui tam actions under the FCA. Here, Cook County asserted that the same rules should apply for local governments. While § 3729 does not define the term "person," the Court noted that its meaning has remained unchanged since the original FCA was passed in 1863. While Cook County conceded that the meaning of "person" included municipal corporations, they argued that Congress intended a more limited meaning in the context of the FCA. First, they argued that the original language of the statute was inherently inconsistent with local governmental liability, based, among other things, on the fact that the statute spoke of imposing criminal liability on violators. The Court rejected this argument, noting it has not been regarded as anomalous to require compliance by municipalities with the substantive standards of federal laws which impose both civil and criminal sanctions upon "persons." Second, the County argued, the history of the FCA supported their argument. Specifically, they noted that the Supreme Court, in an earlier opinion, had recognized that the primary purpose of the FCA was stopping the massive frauds perpetrated by large, private contractors during the Civil War. Local governments, asserted Cook County, were not players in the game of war profiteering that the FCA was meant to stop. While acknowledging this to be true, the Court rejected the County's argument, noting the FCA's historical purpose in no way affects the fact that Congress wrote expansively, intending to reach all types of fraud, without qualification, that might result in financial loss to the Government. Finally, Cook County argued the treble damages incorporated into the statute in 1986 were punitive. Accordingly, their argument went, since a municipality's common law resistance to punitive damages still applies, these revisions eliminated municipal liability in 1986. The Court rejected this argument as well, noting treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives. Further, the Court was quick to note, that inferring the repeal of certain provisions from legislative silence was dangerous, and that it was most likely an error to conclude that the 1986 amendments to the FCA wordlessly redefined "person" to exclude municipalities.

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Lockyer v. Andrade
123 S. Ct. 1166
March 5, 2003

Ewing v. California
123 S. Ct. 1179
March 5, 2003

California's "Three Strikes" law does not violate the Eight Amendment's prohibition against cruel and unusual punishment.

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1st CIRCUIT

U.S. v. Sargent
319 F.3d 4
February 5, 2003

SUMMARY: In order to justify entry without knocking on the basis of concern for officers' safety, the police must "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous. An officer must "be able to point to specific and articulable facts," and have "at least a minimal level of objective justification."

FACTS: Special Agent Andrew Miller of the Maine Drug Enforcement Agency (MDEA) sought and received a search warrant for Roscoe Sargent's apartment in state court, based on information that Miller had received from a confidential informant (CI) only hours before. As his affidavit in support of the warrant stated, that very afternoon a CI had made a purchase of drugs from Sargent at his apartment in Bangor. Miller asked the Bangor Police Department's Tactical Team to help him execute the warrant because he had safety concerns. He had reason to believe that a large number of knives was dispersed throughout Sargent's small, two-room apartment, and that there also might be firearms. This information was not in the warrant, and the court inferred it came from the CI. Miller later testified at the suppression hearing, "The intelligence that I had received was that anywhere that Mr. Sargent was in the apartment that he could put his hand on a knife."

Miller and ten police officers from the Tactical Team executed the search warrant. The group of ten police officers arrived at Sargent's apartment building, entered it, and proceeded down a hallway toward his unit. Upon reaching Sargent's apartment door, they announced their presence by yelling words to the effect of "Bangor police, search warrant, open the door." At the same time, they knocked on the apartment door. The police officers then waited approximately five seconds. They did not hear anyone inside respond or make any motion to comply with their request to open the door. After the five second delay, they smashed open the apartment door with a single stroke of a battering ram.

The apartment was too small for all of the officers to enter. Some of the officers entered the apartment and found Sargent near the doorway; indeed, any place in the apartment was close to the door of the unit. A search of the apartment revealed, as expected, a cache of marijuana and psilocybin mushrooms. Officers also discovered, as expected, multiple knives and a firearm, a shotgun. There were knives throughout the apartment, in a variety of locations, including one stuck in the arm of the chair where Sargent had been sitting when the officers approached his door.

ISSUE: Was forcible entry after waiting only five seconds unreasonable under the Fourth Amendment?

HELD: No

DISCUSSION: Police acting under a warrant usually are required to announce their presence and purpose, including by knocking, before attempting forcible entry, unless circumstances exist which render such an announcement unreasonable. *Wilson v. Arkansas*, 514 U.S. 927 (1995). *Wilson* incorporated the common-law "knock and announce" rule into the Fourth Amendment reasonableness inquiry. The common law knock and announce requirement recognizes the deep privacy and personal integrity interests people have in their homes. It also serves to protect the safety of police officers by preventing the occupant from taking defensive measures against a perceived unlawful intruder. The common law recognized, however, that the presumption in favor of announcement "would yield under circumstances presenting a threat of physical violence." These interests are not inconsequential.

In order to justify entry without knocking on the basis of concern for officers' safety, the police must "have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous." An officer must "be able to point to specific and articulable facts," and have "at least a minimal level of objective justification." The officers, at the time of entry, must have articulable facts concerning, for example, danger to themselves or destruction of evidence, which lead them to believe they can wait no longer. The presence of a reasonable suspicion of danger is properly analyzed at the time of entry. At that moment, the officers knew what they knew earlier -- that there were numerous readily available weapons and drugs in a very small apartment -- but they also knew for the first time that they heard no answer to their knocks and yells. The five second delay, combined with the other factors amounted to a reasonable suspicion of danger.

There are two key issues: whether it was reasonable for the police to expect a response within five seconds after the announcements, and whether it was reasonable for the police to fear a threat to their safety given the circumstances. Both of these issues must be answered affirmatively for this search to be reasonable. Sargent thus had time to respond either verbally or by opening the door in the five seconds after the announcements and before the battering ram broke down the door, but he had not done either. The risk to the officers increased with each second that Sargent did not respond after he had an opportunity to do so.

Despite the brevity of the period between announcement and entry there was, on these facts, no violation of the Fourth Amendment reasonableness standard.

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3rd CIRCUIT

U.S. v. Givan
320 F.3d 452
February 26, 2003

SUMMARY: First, after a traffic stop that was justified at its inception, an officer who develops a reasonable, articulable suspicion of criminal activity may expand the scope of an inquiry beyond the reason for the stop and detain the vehicle and its occupants for further investigation. Second, the totality of the circumstances determines whether a defendant has given his consent to search freely and voluntarily.

FACTS: Defendant and his two passengers were pulled over by a Pennsylvania trooper for speeding. In response to the trooper's request for a driver's license and registration, defendant provided a Michigan's driver's license and a rental agreement, which indicated that the car had been rented in Michigan less than 24 hours earlier. A short time later, the trooper wrote defendant a warning notice for speeding. The trooper then returned defendant's license and rental agreement and informed him that he was free to leave.

Nevertheless, the trooper then asked the defendant if he would mind answering a few questions and the defendant agreed. In response to questions about the destination of his trip, the defendant told the trooper that he had come from New Brunswick, New Jersey, where he visited his sister, who had been in a very bad car accident. By this time, a second trooper arrived to assist with the stop and the first trooper asked the second trooper to inquire of the two passengers from where they had come. The trooper asked and the two passengers said they were coming from New York. The first trooper asked, "Anywhere else?" One of the passengers told the trooper that they were coming back from New York only, where they had been visiting some friends. After hearing the inconsistent explanations describing their travels and observing that the driver appeared to be nervous, the first trooper asked the driver for consent to search the vehicle. The driver said he had nothing to hide and consented to the search. Later, during the search, heroine was found and the defendants were arrested.

ISSUES: (1) Did the officer, after a legitimate traffic stop, develop a reasonable, articulable suspicion of criminal activity that justified expanding the scope of the inquiry beyond the reason for the stop and detention of the vehicle and its occupants for further investigation?

(2) Even if the defendant gave his consent to search the vehicle at a time the officer was justified in extending the stop, did the defendant give his consent freely and voluntarily?

HELD: (1) Yes (2) Yes

DISCUSSION: The district court held that the brief questioning following the return of the driver's documents occurred while the driver had been seized for Fourth Amendment purposes rather than during a consensual encounter that began once the driver's documents were returned and he was informed that he could leave. The Third Circuit held that even assuming the district court's position, the trooper had a reasonable and articulable suspicion of illegal activity sufficient to extend the stop the few additional minutes it took to ask the occupants about their travel destinations. After a traffic stop that was justified at its inception, an officer who develops a reasonable, articulable suspicion of criminal activity may expand the scope of an inquiry beyond the reason for the stop and detain the vehicle and its occupants for further investigation. See *United States v. Johnson*, 285 F.3d 744 (8th Cir. 2002). The trooper knew at that time that: (a) the driver had been speeding; (b) the driver had been operating a motor vehicle that had been rented less than 24 hours earlier in Saginaw, Michigan; (c) the estimated driving time from Saginaw to New York City and back to the sight of arrest was approximately 17 hours; (d) it is a common practice of drug dealers from other states to make a non-stop trip to New York City and back for purchasing drugs; (e) the driver appeared

nervous and fidgety, was talking often and shuffling on his feet; and (f) the driver and the passengers gave conflicting stories about their travel. The trooper was justified in further extending the stop and asking for consent to search the vehicle.

The court then turned its attention to whether the driver voluntarily consented to the search. Voluntariness is a question to be determined from the totality of all of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 223 (1973). The critical factors comprising a totality of the circumstances inquiry include the setting in which the consent was obtained, the parties' verbal and non-verbal actions, and the age, intelligence, and educational background of the consenting individual. *United States ex rel. Harris v. Hendricks*, 423 F.2d 1099 (3rd Cir. 1970). The facts in the record supporting the district court's determination of voluntariness include: (1) the trooper returned the defendant's license and advised him that he was free to leave before asking him if he would mind answering a few questions; (2) the defendant said he did not mind; (3) after asking the defendant some initial questions, the trooper asked the defendant if he would mind if he looked in the vehicle; (4) the defendant replied that he had nothing to hide and the officer could go ahead and look; (5) the trooper testified that when he asked the defendant for his consent, he told the defendant that his consent had to be voluntary and that the defendant did not have to allow the search; (6) both troopers testified that the defendant gave consent without any coercion or duress and this testimony was unrebutted; (7) the defendant gave his consent while standing on the side of a major highway in broad daylight Also, there is nothing in the record indicating that the defendant's age, intelligence or educational background in any way limited his ability to consent voluntarily to the search. The Third Circuit held that the totality of the circumstances in this case indicated that the defendant freely and voluntarily consented to the search.

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5th CIRCUIT

Castellano v. Fragozo
311 F. 3d 689
November 20, 2002

SUMMARY: There is a long recognized constitutional right under the Fourth Amendment to be free from malicious prosecutions as defined under the relevant state law. A malicious prosecution under state law satisfied the constitutional violation requirement for a civil suit pursuant to 42 USC 1983. A civilian who conspires with a police officer to violate constitutional rights acts "under color of law." The jury award of $3,000,000.00 in actual damages and $500,000.00 in punitive damages is affirmed.

FACTS: Castellano owned a chain of fish restaurants in San Antonio and was also the chairman of the San Antonio Fire and Police Civil Service Commission. One of the restaurants burned and the fire department ruled that it was arson. Castellano was arrested, tried and convicted for the arson based in large part on the testimony of two former employees and tape recordings purportedly capturing Castellano discussing the arson with one of the employees, Sanchez, who was the manager at the restaurant that burned. Fragozo was a San Antonio

police officer that worked private security for Castellano. Shortly before the fire, Castellano fired Sanchez because she refused to take a lie detector test about cash shortages at the restaurant and Fragozo quit his job as security officer because Castellano refused to provide him a copy of the upcoming Lieutenant's exam for the San Antonio PD. Fragozo had provided much of the evidence to the arson squad, which led to Castellano. After his conviction, Castellano filed a writ of habeas corpus with the Texas Criminal Court of Appeals where two other employees of the restaurant gave uncontradicted testimony that Sanchez had told them that Fragozo had given her a tape recorder and they were going to record Castellano's conversations and alter them to implicate him in the arson. Both Sanchez and Fragozo (using his authority as a police officer) attempted to get these two employees to testify falsely that Castellano had started the fire. Castellano's expert witness testified that the tapes in question had in fact been tampered with. The appeals court suppressed all the evidence from Sanchez and Fragozo and reversed the convictions. The prosecutor declined to prosecute again for lack of evidence. In U.S. District Court, Castellano sued Fragozo both individually and as a San Antonio police officer and Sanchez for violation of his constitutional rights under 42 USC 1983 for malicious prosecution in violation of several constitutional provisions. The trial court dismissed all but the Fourth Amendment claim.

ISSUE: Does malicious prosecution under state law provide the basis for an actionable 42 USC 1983 civil rights claim?

HELD: Yes

DISCUSSION: The Court of Appeals affirmed the lower court, upholding the $3,500,000.00 jury verdict plus all of Castellano's attorney fees. Under Texas law, a cause of action for malicious prosecution requires the plaintiff to prove 1) a criminal action against the plaintiff; 2) the prosecution was caused by the defendants or with their aid; 3) the action terminated in plaintiff's favor; 4) the plaintiff was innocent; 5) the defendants acted without probable cause; 6) the defendants acted with malice; and 7) the criminal proceeding damaged the plaintiff. The court of appeals said there is a long recognized constitutional right under the Fourth Amendment to be free from malicious prosecutions as defined under the relevant state law. Officer Fragozo was not entitled to qualified immunity because malicious prosecution is a clearly established constitutional violation and the officer's conduct was objectively unreasonable under clearly established law. Fragozo was clearly acting under color of law when he conspired with Sanchez to obtain evidence of Castellano's involvement in the arson and when he provided that information to the arson investigators. Sanchez, a civilian, conspired with Fragozo bringing her actions within "the color of law."

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6th CIRCUIT

United States v. Cole
315 F.3d 633
January 13, 2003

SUMMARY: A passenger in a car stopped for a traffic violation who was handcuffed for "safety reasons" but not arrested was in "custody" for *Miranda* purposes and unwarned responses to questions are inadmissible. However, later volunteered statements which were not in response to questioning are admissible.

FACTS: Police officers Gilbert and Jones were on patrol around 10:30 p.m. when a car traveling in the opposite direction crossed the center line. The officers took evasive action to avoid a collision, and then turned their cruiser around to pursue the other car. The officers activated their cruiser's flashing lights and brought the other car to a stop. When the other car stopped, the rear passenger-side door opened and closed, though no one got out of the car. The rear driver-side door opened, and a man identified as Cole got out. Officers Gilbert and Jones also exited their police cruiser. Cole walked toward Officer Jones, called him by name and stated that he was not carrying any narcotics. Officer Jones replied that he was going to handcuff Cole for safety reasons, which he proceeded to do. At this point Officer Gilbert, who had been exploring the vicinity with a flashlight, announced that he had found a handgun in a ditch next to the car.

Without advising Cole of his right against self-incrimination, Officer Jones asked: "Whose gun is this?" Cole replied that he owned the gun, but that someone else was carrying it. Officer Jones advised Cole that he was under arrest. Officer Gilbert and another officer who had arrived at the scene transported Cole to the police station. Officer Jones rejoined them at the station. While being booked at the station, Cole harangued Officer Jones with protests, stating repeatedly that although he owned the gun, he had not been carrying it, and it was unfair to charge him with its possession.

Officers Gilbert and Jones then placed Cole in their police vehicle to transport him to the jail. It was at that point that Officer Jones first advised Cole of his *Miranda* rights. Cole asked and was told what crime he was being charged with, and he continued to argue that he was being treated unfairly. Neither officer asked Cole any questions during the trip, but until their arrival at the jail, Cole volunteered substantially the same comments that he had previously made about ownership of the gun.

ISSUES: (1) Did the handcuffing of Cole at the occasion of the traffic stop constitute "custody" for purposes of *Miranda*?

(2) Are voluntary statements, not in response to interrogation, admissible even though defendant has not validly waived his *Miranda* rights?

HELD: (1) Yes (2) Yes

DISCUSSION: Statements made by a defendant in response to interrogation while in police custody are not admissible unless the defendant has first been apprized of the constitutional right against self incrimination and has validly waived this right. *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966)

In reviewing the facts the court made the determination that Cole was in "custody" for purposes of *Miranda*. Cole was not the driver of the vehicle that had committed the traffic infraction and when he encountered Officer Jones, Cole was not told he was under arrest but advised that he was being handcuffed for safety reasons. Nonetheless, the court ruled that when Cole was handcuffed, he was in custody, triggering *Miranda*. Cole's admission at the scene of his arrest that he owned the gun was suppressed because he had not been advised of his rights, and his admission was in response to Officer Jones direct question about ownership of the gun.

The Supreme Court has defined "interrogation" as "words or actions on the part of police officers that they should know are reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980). In this case, aside from Officer Jones' initial question, the police officers asked Cole no questions about gun ownership or possession, and they took no actions that were likely to elicit an incriminating response.

Relying on *Oregon v. Elstad*, 470 U.S. 298, 309 (1985), the court ruled that a statement obtained in violation of *Miranda* does not, by its own force, mandate the inadmissibility of subsequent similar statements that were constitutionally obtained. "Because the record reflects that Cole's statements while being booked and later transported to jail were spontaneous and unprovoked by Officer Jones's initial question at the scene of the crime, the initial *Miranda* violation furnishes no basis to suppress the subsequent statements. *Cole*, 315 F3d. at 637. Consequently, Cole's voluntary unsolicited statements (during the booking process and during the ride to the jail) are admissible.

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7th CIRCUIT

Thompson v. Wagner
319 F.3d 931
February 13, 2003

SUMMARY: Police officers are entitled to qualified immunity, and a plaintiff's 42 U.S.C.S. §1983 action against them must be dismissed without a trial if a reasonable officer could have believed that, in light of the facts and circumstances within the officers' knowledge and clearly established law, the plaintiff had committed or was committing an offense. A reasonable but mistaken belief that probable cause exists is sufficient for entitlement to qualified immunity. The case should not be permitted to go to trial if there is any reasonable basis to conclude that probable cause existed.

FACTS: In December, 200, at the Kane County flea market, an exhibitor named Diane Richardson, sold two diamond rings, each more than one carat in size, for an amount in excess of $10,000.00 to Chuck Berry (not to be confused with the Chuck Berry of "Maybellene" fame). Berry paid for these rings with two separate personal checks. Shortly after the transaction, to no one's surprise, the two checks bounced. Richardson complained to the Kane County Sheriff's Department, and the two defendants, deputy sheriffs David Wagner and Keith Gardner, were assigned to the case.

Two weeks after the incident Wagner and Gardner interviewed Berry, who was in jail on an unrelated matter. Berry admitted writing two bad checks for $10,475.00 for the two rings. He also stated that two local felons, Myers and Risch, now had the rings. Initially each of these individuals said that the other had given the rings to their respective girlfriends.

Some five (5) months later, Myers admitted that he did, at one time, possess one of the rings. He went on to say that Risch had given him a two-carat men's ring (notwithstanding the two rings in question were around one carat each), which he in turn gave to his girlfriend, Delores Henry. Myers then related the following to the two deputies:

> Delores Henry removed the diamond and put it into her own setting. She then traded her ring to her brother, Robert Thompson, for a car.
>
> Robert Thompson removed the diamond from this setting and placed it into the wedding ring of his wife, Beverly Thompson.
>
> Myers took back the men's ring purchased from the flea market (sans diamond), from Delores Henry.
>
> Myers then had a cubic zirconia stone put into it, and intended to return it to Risch. This ring, with the cubic zirconia, was given to the two deputies.

Beverly Thompson now wears the two-carat diamond in her wedding set on her left hand. One hundred and Sixty-six days (more than five months) after the purchase of the rings from Richardson at the Kane County flea market, the two deputies decided to interview Beverly Thompson. They decided to do so at her place of employment, the local Kroger store. Mrs. Thompson had worked at this store for more than twenty years, and had no criminal record.

Neither deputy conducted any background on Beverly Thompson. They did not interview Delores Henry or Robert Thompson. Thy did not check public records to determine if Henry had recently received a car from her brother; nor did they determine if the ring worn by Beverly Thompson matched the one(s) sold by Richardson at the flea market. In addition, they had no training or experience in identifying, valuing, or sizing diamonds.

The two intrepid deputies interviewed Mrs. Thompson in the pharmacy waiting area of the Kroger store. At his time she was wearing two diamond rings, one on each hand. They advised her that she was not under arrest, but that they believed that she was wearing stolen property.

Furthermore she was told that if she admitted her "guilt," she would not be arrested that day. They asked her to surrender the two rings. Mrs. Thompson told them that she desired to call her husband. When she arose from her chair to do so her way was blocked by Deputy Wagner. The two deputies then placed her in handcuffs, where she remained for approximately ten (10) minutes. Mrs. Thompson became upset, and when the handcuffs were removed she surrendered the rings.

However, she remained in the officers' custody, and again requested to telephone her husband. In response, the officers escorted Mrs. Thompson out of the store and escorted her to their squad car located in the Kroger's parking lot. She remained there for approximately another ten (10) minutes. She was released from custody when her husband arrived and signed a property receipt for the two rings. This whole episode lasted about one hour.

Mrs. Thompson was never charged with a crime. The two rings that she was wearing were returned to her. They were later determined not to be the ones sold at the Kane County flea market. Mrs. Thompson filed suit under 42 U.S.C. § 1983 against the two deputies for a violation of her constitutional rights.

At trial Deputy Gardner testified that he believed that Mrs. Thompson had committed, or was about to commit, the crime of "obstruction" of justice when she attempted to call her husband.

Deputy Wagner testified that he had handcuffed her because he "suspected" that the diamond on her left hand was stolen. He further testified that when Mrs. Thompson attempted to walk away to telephone her husband, he believed that she was either (a) going to throw the ring away, or, (b) was attempting to conceal the ring.

The trial court granted summary judgment to the officers on qualified immunity grounds.

ISSUE: Does the umbrella of qualified immunity shield officers from civil liability when they make a warrantless arrest without probable cause?

HELD: NO.

DISCUSSION: In this case, the Seventh Circuit rejected the finding of qualified immunity stating that given the facts and circumstances of the case, the officers failed to establish probable cause to arrest Mrs. Thompson.

While the Fourth Amendment prohibits unreasonable searches and seizures, a warrantless arrest is permitted if the arresting officer(s) have probable cause. *Sparing v. Village of Olympia Fields*, 266 F.3d 684 (7th Cir. 2001) (citing *United States v. Watson*, 243 U.S. 411 (1976). Arresting officers determine probable cause from (1) the facts and circumstances of the case within their knowledge at the time of arrest, *United States v. Carillo*, 269 F3d. 761 (7th Cir. 2001), and, (2), reasonable inferences that they may draw based upon their training and experiences in determining whether suspicious circumstances rise to the level of probable cause. *Spiegel v. Cortese*, 196 F.3d 717 (7th Cir. 2000).

Qualified immunity shields local police officers from civil liability insofar as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). However, the defense of qualified immunity is not available to "the plainly incompetent, or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

If the deputies had probable cause to arrest Mrs. Thompson, then they are shielded by qualified immunity, and her suit must be dismissed. In cases involving the issue of whether probable cause existed to support an arrest, "the case should not be permitted to go to trial if there is any reasonable basis to conclude that probable cause existed." *McDonnel v. Cournia*, 990 F.2d, 963 (7th Cir. 1993). This is a high hurdle for plaintiffs to jump. High, but not insurmountable.

Although Mrs. Thompson was advised that she was not under arrest, she was clearly arrested when the deputies prevented her from leaving to call her husband, handcuffed her, and asked her questions without advising her of her rights. Her arrest was further compounded when she was placed into the squad car.

The deputies acted unreasonably when they relied strictly upon the five month old statement of Myers, a convicted felon, who had lied to them earlier in the investigation. The Court also stated that since the deputies had conducted no additional investigation, and had absolutely no knowledge concerning diamonds, their actions were even more unreasonable.

As to the "obstruction" theory, the Court stated that Mrs. Thompson voluntarily went with the officers to the waiting area and was advised that she was not under arrest. She had a right to get up and call her husband, and to believe otherwise would be to say that anyone who decides to terminate a voluntary conversation with a police officer commits a crime. The Court added that it would "not be reasonable—or consistent with the Fourth Amendment—for a police officer to hold this view."

The Court also said that the officers were not justified in handcuffing and detaining Mrs. Thompson, according to *Terry v. Ohio*, 392 U.S. 1 (1968), because they never testified that they did so for their own protection.

Finally, in its ruling, the Court stated that the two deputies "seemed" to have decided upon a course of action even before they entered the Kroger store. If Mrs. Thompson had the diamond, and refused to surrender it to them, she could have been arrested. But they had no probable cause to believe that the diamond on her left hand was the one that was acquired by fraud at the Kane County flea market; nor did they have a valid charge of obstruction. Without probable cause or a valid charge of obstruction, their actions could not be protected by qualified immunity.

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8th CIRCUIT

U.S. v. Briley
319 F.3d 360
February 14, 2003

SUMMARY: When authorities have a warrant to search a defendant's residence for evidence of drug contraband, and where surveilling officers trail a defendant from his residence, they may initiate a stop for the purpose of informing the defendant of the search warrant and to request his presence at the residence when the officers execute the warrant.

FACTS: Law enforcement officers obtained a search warrant to search Briley's home for contraband drugs. A deputy decided to stop Briley in his vehicle to inform him of the impending search. When the deputy ordered Briley to pull over, he fled and a high-speed chase ensued. When officers caught Briley, they found a wallet which contained a counterfeit $20 Federal Reserve Note and a counterfeit driver's license.

Upon executing the search warrant, the agents found 48 additional counterfeit notes and a computer, color printer, and a printout containing the images of other counterfeit driver's licenses.

ISSUE: Were the counterfeit bill and the counterfeit license found in defendant's wallet fruits of an illegal stop?

HELD: No.

DISCUSSION: An investigative stop of a vehicle does not violate the Fourth Amendment where the police have a reasonable suspicion that the occupant of the vehicle is engaged in criminal activity.

"There is no requirement that there be a traffic violation." Here, the officer had probable cause to believe that Briley was manufacturing and distributing methamphetamine. Indeed, the officer had just obtained a warrant to search Briley's premises for evidence of contraband. To safely execute the warrant, the officer decided that it would be best to inform Briley of the search and request that he be present during the search.

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10th CIRCUIT

United States v. Rhiger
315 F. 3d 1283
January 14, 2003

SUMMARY: A guest who has a sufficient ongoing and meaningful connection to someone else's premises is protected by the Fourth Amendment against an unreasonable government intrusion into that place. Therefore, the guest has standing to challenge the entry and search of the premises. Exigent circumstances, such as the immediate need to protect lives or property, can justify the warrantless entry and search of a home.

FACTS: While conducting surveillance Federal Drug Agents saw Joel Rhiger and two companions purchase materials used to manufacture methamphetamine. The agents followed Rhiger and one of his companions, Carl Baker, to the home of another person, Randy Brown. Once at Brown's home, Rhiger and Baker brought the recently purchased materials inside. After watching Brown's house for one hour the agents smelled what they believed to be the odor of cooking methamphetamine coming from Brown's home. Fearing an explosion from an active methamphetamine lab the agents entered Brown's home without a warrant. Once inside the home the agents found an active methamphetamine lab in the garage. The agents shut down the lab and arrested Rhiger, Baker and Brown. Rhiger proceeded to trial and was convicted of conspiracy to manufacture methamphetamine and possession of methamphetamine with intent to distribute. The district court denied Rhiger's motion to suppress evidence obtained by the agents during the warrantless entry and search of Brown's home. Rhiger argued that the district court incorrectly found that exigent circumstances existed justifying the agents' warrantless entry into Brown's home and subsequent search. The United States Court of Appeals for the Tenth Circuit disagreed and affirmed Rhiger's convictions.

ISSUE: (1) Did Rhiger have standing as a guest to challenge the warrantless entry and search of Brown's residence?

(2) Did exigent circumstances exist justifying the agents' warrantless entry into Brown's home?

HELD: (1) Yes (2) Yes

DISCUSSION: The government argued that Rhiger was a commercial guest, one whose primary purpose at the residence was to conduct business, and therefore had no standing to challenge the entry and search of Brown's home by the agents. Rhiger argued that he was a guest with sufficient connection to Brown's home to be protected there by the Fourth Amendment. While Rhiger did not permanently reside with Brown, he testified that he occasionally stayed overnight at Brown's home, kept personal items there, and was permitted to be in the home while Brown was not there. On the day of the search, at some point, he entered Brown's home and took a nap in Brown's bedroom while Brown was gone. The court found that these facts established that Rhiger had an ongoing and meaningful connection to Brown's home as a guest. Therefore, he had standing to challenge the agents' entry and search of Brown's home.

Searches and seizures inside a home without a warrant are presumptively unreasonable. *Payton v. New York,* 445 U.S. 573 (1980). However, agents may conduct warrantless searches

if they believe that their own lives or the lives of others are at risk. *United States v. Wicks,* 995 F.2d 964 (10th Cir. 1993). The basic aspects of this "exigent circumstances" exception are that:

1. The law enforcement officers must have reasonable grounds to believe that there is immediate need to protect their lives or others or their property or that of others,
2. The search must not be motivated by an intent to arrest and seize evidence,
3. There must be some reasonable basis, approaching probable cause, to associate an emergency with the area or place to be searched. *Wicks,* 995 F.2d at 970.

The government has the burden to establish the existence of the exigent circumstance. The court evaluates the circumstances as they would have appeared to prudent, cautious and trained officers. *United States v. Cuaron,* 700 F.2d 582 (10th Cir. 1983).

Agent Mallory, who was in charge of the operation that day, testified that he was assigned to the United States Drug Enforcement Task Force where he worked primarily for the Clandestine Laboratory Team. During this time he received over 200 hours of instruction regarding the manufacture of methamphetamine, and the investigation and dismantling of methamphetamine labs, while being directly involved in the investigation and cleanup of at least 125 methamphetamine labs. Agent Mallory testified that during their surveillance agents saw Rhiger purchase chemicals and other materials used in the production of methamphetamine. After purchasing these items Rhiger went to Brown's home where he entered the residence with these items. One hour later the agents smelled a strong odor of what they believed was methamphetamine cooking coming from Brown's home. Agent Mallory testified that the heat generated from methamphetamine cooking can be very intense and can cause fires. Additionally the vapors from the manufacture of methamphetamine are extremely flammable, and in large quantities can produce a large explosion creating a danger for the immediate public. The court held that the evidence presented established reasonable grounds for the agents to believe there was an immediate need to protect the public by entering the home without a warrant and discontinuing the lab's production.

The court then determined that the agents were concerned for public safety and there was no evidence to suggest that the agents entered Brown's residence with the intent to arrest and seize evidence. Agent Mallory testified that once the agents located the active methamphetamine lab in the garage the first thing they did was to remove the heat to shut down the lab. An active methamphetamine lab produces explosive poisonous gases and removing the heat source is the first step in preventing a possible explosion. Only after the agents detained Rhiger, Baker and Brown, turned off the heat, and obtained a search warrant did they re-enter Brown's home and conduct a further search of the premises.

The court finally held that the agents had a reasonable basis approaching probable cause to associate an emergency with the place to be searched. The agents' observations of Rhiger and his companions purchasing materials used to manufacture methamphetamine, their entry into Brown's home with these materials a short time later, the odor of cooking methamphetamine coming from Brown's home, and their knowledge of the potential explosiveness of an active methamphetamine lab was more than enough evidence to establish that the agents had a

reasonable basis to associate an emergency with the place to be searched. Therefore, the warrantless entry into Brown's home by the agents was justified.

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11th CIRCUIT

U.S. v. Franklin
2003 U.S. App. LEXIS 4280
March 12, 2003

SUMMARY: Defendant's presence in a problem area, at night, underneath a no loitering sign, and his flight from the officers established reasonable suspicion to conduct a brief investigatory stop.

FACTS: The Riviera Beach, Florida, Police Department Special Response Team (SRT) - a special Weapons and Tactics (SWAT) team - was patrolling the "problem areas" of the city for drinking, drug-trafficking, loitering, crowd control, and trespassing. The team members dressed in their SRT uniforms including body armor, boots, fatigues, and sidearms.

At approximately 10:15 p.m., the teams noticed Franklin. He was standing, by himself, underneath a "no loitering" sign in front of a Chinese take-out restaurant. The officers decided to ask Franklin what he was doing. They pulled up in front of Franklin and stopped. The officers began to step out of the van. As soon as he saw the officers, Franklin ran away. Two of the SRT officers, Detective Newton and Officer Mammino gave chase. Franklin ran around the side of the building and climbed a chain link fence. After climbing the fence, he ran diagonally across a parking lot and began to scale a second fence. Detective Newton caught Franklin as he was attempting to climb the second fence. As Franklin was struggling with Detective Newton, Franklin attempted to reach for something in his waistband. Newton thought it might be a weapon. Officer Mammino arrived and helped Newton secure Franklin, handcuff him, and move him to a lighted area. The officers asked Franklin why he had run. He said that he had an outstanding arrest warrant. Officer Mammino searched Franklin and found two bags of marijuana and a pill bottle containing 18.5 grams of crack cocaine. Detective Newton searched the area around the second fence. He found Franklin's hat and 106 small zipped plastic bags containing a white powder which tested positive for cocaine.

Franklin filed a motion to suppress which was denied. Franklin entered a conditional guilty plea.

ISSUE: Did defendant's presence in a problem area, at night, underneath a no loitering sign, coupled with his flight from the officers establish reasonable suspicion to conduct a brief investigatory stop?

HELD: Yes

DISCUSSION: The Fourth Amendment to the Constitution prohibits "unreasonable" searches

and seizures. The reasonableness of a seizure is determined using all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself. When the officers approached Franklin, he was in a "problem area," at night, standing under a "no loitering" sign. The Court assumed the SRT officers, at this point, lacked reasonable suspicion. The officers, however, could still approach Franklin and speak to him. There is nothing in the Constitution which prevents a policeman from addressing questions to anyone in the streets. Franklin was not seized until he was tackled. Therefore, the officers can consider everything that happened up to that point to establish reasonable suspicion.

Those facts include Franklin's presence in a problem area, at night, standing underneath a no loitering sign, and his flight from the officers. The facts are sufficient to establish reasonable suspicion. Franklin's flight was particularly suspicious because of its nature and duration. He ran away at full speed as soon as he saw the officers. He did not turn and start to walk away. He did not act like he was going about his business. Instead, he took off in a "headlong" flight. The duration of his flight is also suspicious. He ran behind the building, climbed a fence, sprinted across a parking lot and began to scale a second fence. While initially his flight might have indicated that he was trying to remove himself from a potentially dangerous situation, at some point between when he climbed the first fence and started to scale the second, his flight more clearly indicated his potential involvement in wrongdoing and his desire to evade the police. This flight, combined with the other factors gave the officers reasonable suspicion to stop Franklin.

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Willingham v. Loughnan and Buecler
321 F.3d 1299
February 18, 2003

SUMMARY: Officer-defendants are entitled to qualified immunity, where they shot Plaintiff within a "split second" after she attempted to kill one officer and assaulted another. No prior caselaw clearly established that the use of this force was unconstitutional, and it was not clearly egregious.

FACTS: Plaintiff obtained a number of objects from the kitchen and threw them at Panucci and Loughnan. She threw a glass at Loughnan striking him in the shoulder. She picked up a knife in the kitchen and threw it at Panucci's back in an attempt to kill him. She immediately thereafter raised her hands to her head and, at that time, was shot four times by each of the officer defendants. The shots were fired within a split-second of her assault on Loughnan and of her attempt to kill Panucci, but while she was unarmed. She was also standing in the doorway to the kitchen where she had obtained the bottles and knife she had already thrown at the officers. Plaintiff sued defendants for excessive use of force.

ISSUE: Did the officer defendants violate clearly established federal law by shooting Plaintiff within a "split second" after she attempted to kill one officer and assaulted another?

HELD: No

DISCUSSION: The officer defendants are entitled to qualified immunity for their acts unless they, given the circumstances, violated a clearly established statutory or constitutional right. An official is entitled to "notice his conduct is unlawful" and to "fair warning" that his conduct deprived his victim of a constitutional right. This notice of fair warning exists when the applicable law is "clearly established" at the time of the official's alleged unlawful conduct. For a constitutional right to be clearly established, its contours must be sufficiently clear to warn the officer that what he is doing violates that right. The unlawfulness must have been apparent at the time.

The Fourth Amendment permits only "reasonable" applications of force. The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. It requires careful attention to the facts and circumstances of each particular case. Generally, no bright line exists for identifying when force is excessive. Earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established. Unless a controlling and materially similar case declares the conduct unconstitutional, a defendant is usually entitled to qualified immunity.

The Supreme Court in *Hope v. Pelzer, 536 U.S. 730* (2002) stresses that preexisting caselaw with "materially similar" or "fundamentally similar" facts is not always necessary to give an official "fair warning" of unlawful behavior. Some conduct is so obviously contrary to constitutional norms that even in the absence of caselaw, the defense of qualified immunity does not apply. Conduct can be so far beyond the hazy border between excessive and acceptable force that the defendant had to know he was violating the Constitution even without caselaw on point.

Plaintiff was not able to point to a single case from the U.S. Supreme Court, Eleventh Circuit, or Supreme Court of Florida which had already decided that the use of deadly force on a Plaintiff (1) who had just attempted to murder one police officer and assaulted another, (2) who was not under police control, and (3) was close by a source of weapons was unconstitutional. This incident was not a clearly egregious shooting that was far beyond the hazy border of acceptable force. The officer defendants are entitled to the defense of qualified immunity.